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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.2104 OF 1991

1. Vasantrao Gulabchand Shah ... Petitioners
2. Dhanyakumar Walchand Shah
vs
1. Vithal Bansi Bankar ... Respondents
2. Shankar Bansi Bankar
3. Waman Bansi Bankar

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Mr.M.L.Patil for Petitioners
Mr.K.Y.Mandlik for Respondents

CORAM: D.G.KARNIK, J
DATE: 5TH AUGUST, 2004.

P.C.

1. By this petition, the petitioner challenges the judgment and order dated 8th March, 1991 passed by the VIIth Additional District Judge, Pune dismissing Civil Appeal No.1972 of 1987 and thereby confirming a decree for possession passed against them by the Small Causes Court, Pune.

2. The respondents are the owners and landlords of the property bearing House No.502 Ghorpade Peth, PUne. The petitioner no. 1 is a tenant in respect of premises consisting of one room and a verandah (for short the suit premises) situate in the said House No. 502 Ghorpade Peth, Pune. The respondents had previously filed a suit bearing Regular Civil Suit No. 454 of 1983 against the petitioner no. 1 for eviction which was dismissed. Subsequently, the respondents filed another suit bearing Suit No. 454 of 1983 against the petitioners for possession alleging that the petitioner no.1 had illegally and unlawfuly sublet the suit premises to the petitioner no.2. The respondents also claimed possession on the ground of bonafide requirement, default and change of user. The trial Court passed a decree for possession on the ground of subletting and change of user. Other grounds were negatived. On appeal, the Appellate Court reversed the finding on the issue of change of user but, confirmed the decree for possession on the ground of subletting. That judgment is impugned in this Writ Petition.

3. The petitioner no. 2 is a son-in-law being the husband of a daughter of petitioner no. 1. Both the Courts below have however held that the petitioner no. 2 is a subtenant for two reasons :

(i) the petitioner no.1 who along with his family was initially residing in the suit premises had shifted to

Nira and had permitted his daughter and son-in-law to reside in the suit premises.

(ii) previously the petitioner no. 1 had allowed another son-in-law namely Ramesh Shah to live in the suit premises as a licencee on a nominal licence fee of Re.1/- per month.

I fail to see how either of the two circumstances mentioned above which have been relied upon by the two Courts below prove that the petitioner no. 2 is a subtenant of the petitioner no. 1.

4. The respondents examined respondent no. 3 on the point of subletting. Though one more witness was examined, he was on a different point and not on the issue of subletting. The entire evidence about subletting is found in para no. 5 of his deposition of respondent no. 3 which reads as follows :

" The defendant no. 1 has sublet the suit premises to the defendant no. 2 who is doing the business of manufacturing work there. Defendant no. 1 has no right to sublet the suit premises to the defendant no. 2. and have no permission to sublet the suit premises. The defendant no. 2 has no right to remain in possession of the suit premises. "

There is no statement in his deposition that the petitioner no. 1 had put the petitioner no.2 in exclusive possession of the suit premises. There is no statement that the petitioner no. 2 was paying any rent, charges, compensation or any other amount whatsoever to the petitioner no.1. No other evidence whatsoever was adduced by the respondents to prove that the petitioner no. 1 had sublet the premises to the petitioner no.2.

5. The petitioner no. 1 examined himself on oath. He stated that he was residing in the suit premsies with his daughter. Respondent no. 2 was his son-in-law who came to reside with him in the suit premises as a member of his family. In the cross-examination he admitted that he had previously given the suit premises on leave and licence to another son-in-law on nominal licence fee of Re.1/-. No question was put to him whether the petitioner no.2 was in exclusive possession of the suit premsies and whether he was paying any rent or other charges to him.

There was no evidence whatsoever that the petitioner no.1 had parted with the possession of the suit premises. There was no evidence that the petitioner no. 1 was recovering any rent or any other rent whatsoever from the petitioner no. 2 for permitting him to stay

with him in the suit premises.

6. It is true that there is no legal bar nor presumption in law that a person can never sublet the suit premises to his son-in-law. It is possible that a person may sublet the suit premises to his son-in-law but subletting would have to be proved like any other fact. Mere presence of son-in-law on the premises by itself, would not prove subletting. Assuming that the petitioner no. 1 was living at Nira, as held by the Courts below, there is no finding that the petitioner no.1 had parted with the legal possession of the premises and/or had lost exercising control over the premises. Reference may usefully be made to the decision of this Court in Krishnavadan Ramlal Chinai vs. Shantaben Chakubhai Mistry reported in 1985 Bom R.C. 18. In para 12 of the judgment, the Court has observed:

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" Mere user of the premises by other members of the family is not parting with possession, so long he retains the legal possession. For creating sub-lease, there must be vesting of possession by tenant in another person by divesting himself not only of physical possession but also of the right to possession. The mere fact that the tenant is not in physical possession or is living some where else, will not amount to divestment or abandonment of the right to possession. Moreso when his family members are occupying the premises on his behalf. It is no doubt true that there is no legal bar nor a presumption in law that a father or a son can never sub-let premises in favour of other. However in view of the accepted way of life in this country such an inference cannot be easily drawn. For proving the tenancy or sub-tenancy between the close relatives, very strong case, based on cogent evidence will have to be made out. In the absence of very strong evidence such an inference cannot be drawn. "

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These observations clearly apply to the facts of the present case. In these circumstances, the finding as to subletting is clearly perverse.

7. Accordingly, the petition is allowed. The impugned judgment and order is set aside and the suit of the respondents is dismissed. Rule made absolute with no order as to costs.

D.G.KARNIK, J

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